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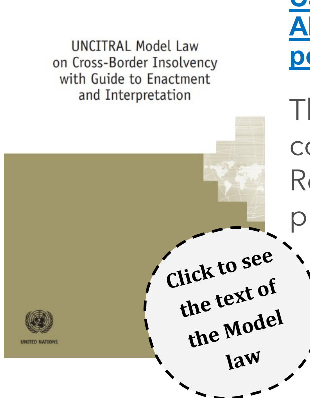
UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW | 12.9.2024

CLOUT NETWORK
Case Law on UNCITRAL Texts

In the past few months, the UNCITRAL Secretariat has issued four new CLOUT issues (233, 234, 235, 236) as well as individual CLOUT cases (2169-2175 (pending publication)) for a total of **36** new cases from **Australia**, **Belarus**, **People's Republic of China**, **Hong Kong SAR, China**, **India**, **Kenya**, the **Netherlands**, the **Philippines**, the **Republic of Korea**, **Singapore**, **Slovenia**, **Ukraine**, the **United Kingdom of Great Britain and Northern Ireland**, the **United States of America** and **Zimbabwe**. The new cases relate to **CISG**, **ECC**, **Limitation Convention**, **MAL**, **MLEC**, **MLCBI** and **NYC**.

Many thanks to Gourab Banerji, Alan Davidson, Allan Gropper, Aleksei Korochkin, Arjun Krishnan, Yat Hin (Adrian) LAI, Stewart Maiden KC, Irit Mevorach, Promod Nair, Sriharsha Peechara, George Pothan Poothicote, John Pottow, Sim Kwan Kiat, Manisha Singh, Jan Smits, S.I. Strong, Ajay Thomas, Sergei Voitovich and Bona Zhang (National Correspondents), Olya Antle, Steven Debie, Tjaša Kalin, Young-Seok Kim, Valeria Manfredonia, Anastasiia Shymon, Ana Vlahek and George Weru (Voluntary Contributors) for their contributions.

Cases in focus



Case 2155: MLCBI 21 | Republic of Korea: Supreme Court | Case No. 2009 Ma 1600 | 25 March 2010 | Original in Korean Abstract prepared by Young-Seok Kim [Keywords: public policy; recognition; relief]

The debtor's reorganization proceeding had been commenced in the United States of America before the Republic of Korea enacted the MLCBI in 2006. That proceeding had subsequently been recognized in the Republic of Korea under the Debtor Rehabilitation and Bankruptcy Act (DRBA) (enacting the MLCBI). After recognition, the Hight Court of Seoul had allowed a domestic insolvency proceeding commenced by a creditor against the debtor to proceed over the debtor's objection. [CLOUT case 1000] This case is the debtor's appeal of that Hight Court's decision. The appellant argued that, since the debtor had been discharged from all its debts in the United States proceeding, which was recognized in the Republic of Korea, the request for repayment of bonds held by the creditor was invalid even if no specific relief to that effect was sought and granted upon recognition of the United States proceeding. The Supreme Court dismissed the appeal and affirmed the High Court's decision, noting the distinction between recognition of a foreign proceeding, which was governed by the DRBA, and recognition and enforcement of a foreign judgment, which were governed by the Civil Procedure Act. The Supreme Court noted that, according to the High Court, recognition of a foreign proceeding was aimed at obtaining a relief for the foreign proceeding, particularly to secure domestic assets required for implementing the insolvency order issued by a foreign court, and it is thus purely procedural in nature. On the contrary, recognition and enforcement of a foreign judgment may alter or discharge creditors' substantive rights by recognizing or enforcing a foreign judgment that releases a debtor from its liabilities. The Supreme Court held that, although the High Court misunderstood those underlying legal principles by stating that the effect of the United States discharge order would have been recognized in the Republic of Korea under the DRBA if, upon recognition of the United States proceedings, such a specific relief was granted under the DRBA, § 636 (enacting article 21 MLCBI), that misunderstanding did not affect the outcome of this case. The Supreme Court ruled that the United States discharge judgment could not be recognized in the Republic of Korea and could not prevent the creditor to pursue a claim in the Republic of Korea. In support of its ruling, the court explained that accepting the discharge order would violate the Republic of Korea's good customs and social orders, pursuant to article 217, paragraph 3 of the Civil Procedure Act, by substantially and unfairly infringing upon the right of the creditor that expected to be paid through domestic proceedings in the Republic of Korea because the insolvency law of the Republic of Korea was based on territorialism when the United States insolvency proceedings were opened.

Case 2175 (pending publication): Limitation Convention, 1980 (amended text) 3(1)(b); 8; 9; 10; 13; CISG 4 | Netherlands (Kingdom of the): Limburg District Court (Rechtbank Limburg) | Case No. C/03/213804 / HA ZA 15-691 Daim Polska SP. Z O.O. v. Hoytink Holding B.V. | 14 December 2016 | Original in Dutch | Published: (2016) C/05/300992/ HA ZA 16-195 | Available at: https://cisg-online.org/search-for-cases?caseId=12620

A Polish company engaged in the sale and supply of bottle caps ('the seller') had entered into a contract of sale with a Dutch company ('the buyer'). The seller requested payment of four invoices from the buyer by letter in November 2015. Since the buyer failed to respond to it, the seller initiated proceedings before the Limburg District Court. The buyer argued, among other things, that the seller's claim was time-barred. The court considered that the transactions before it were subject to the CISG and for matters outside that Convention, Polish law was applicable pursuant to private international law. It noted that according to Article 4 of CISG that Convention governs only the formation of contracts of sale and the rights and obligations of the seller and buyer arising from such a contract, whereas the matter of limitation period is not regulated in the CISG. Noting that Poland is a party to the amended version of the Limitation Convention and the Netherlands is not, the court held that in accordance with article 91(2) of the Polish Constitution an international agreement takes precedence over Polish domestic law and thus recognized the applicability of the amended Convention on the basis of article 3(1)(b) under which the Convention applies if the rules of private international law make the law of a Contracting State applicable to the contract of sale. The Limitation Convention was thus applicable to the contract of sale at issue. As to the commencement of the limitation period, the court referred to articles 8, 9 and 10 and noted that the four-year limitation period under the Convention commences on the date on which the breach of contract occurs, in this case the non-payment of invoices, the last of which, dated 12 November 2009, had a payment period of fourteen days and was thus due on 26 November 2009. The court found that in principle the limitation period had expired on 26 November 2013. The seller contended that the limitation period had been interrupted by some partial payments made by the buyer in 2009 and 2010 and the submission of claims for verification in the context of the buyer's insolvency proceedings in 2013. The court however stated that article 13 of the Limitation Convention only provides that the limitation period shall cease by the creditor's act of initiation of legal proceedings against the debtor. The court found that Dutch law, the Netherlands being the country in which the legal action was instituted, was the law that would indicate which acts qualified as the commencement of legal proceedings. In accordance with that law, it concluded that the making of a partial payment by the buyer did not relate to an act of the seller and that the filing of a claim for verification in an insolvency proceeding under Dutch law did not qualify as the initiation of legal proceedings against the buyer. The court concluded that the limitation period had not ceased to run and considered the seller's claims time-barred.

Newsletter Contributions

Some comments on Demex Pty Ltd v John Holland Pty Ltd [2022] QSC 259 | CLOUT case 2148 | Alan Davidson National Correspondent (Australia)

This case deals with the time of receipt of an email under the New South Wales *Electronic Transactions Act 2000* based on sub-article 10(2) of the United *Nations Convention on the Use of Electronic Communications in International Contracts*. However, there are two issues which the Court neglected to consider that require additional comments.

The Case

The case depended upon proving the time of receipt an email. The email was sent on Saturday 25 September 2021 and first read on Monday 27 September. If the email was "received" on the Saturday, then the first day for counting of an applicable statutory period would be the Monday. However, if the email was "received" on the Monday then the first day for counting would be the Tuesday. At stake was a statutory debt of A$5,395,557.59.

The plaintiff submitted that proof of receipt soon after the email is sent is an "obvious inference to be drawn in all the circumstances". The defendant submitted that the plaintiff bears the evidential onus of proof, and failed to prove that the email was received by it at or about the time it was sent.

The Court stated "the proper construction of these provisions is that service of a payment claim by email is effected when it is received at the nominated email address of the recipient party. There is no requirement that the recipient party must be aware of the receipt".

The Court held that email was sent on Saturday 25 September 2021; however, "proof of the date and time an email was sent does not automatically prove the date and time it was received". The Court stated that without more this cannot "be presumed to accurately prove the date and time the email was received". The Court considered that the issue must be proven on the balance of probabilities, and in this case, it was "not satisfied on the evidence adduced that the fact in issue has been established to that standard". It stated that it should not assume "that the email was received at or about the time it was sent … There is no 'reading' or 'measurement' showing the received date and time". Therefore the email was not received until the Monday and the first day for counting was the Tuesday.

Two Comments

(1) The Court stated, "There is no 'reading' or 'measurement' showing the received date and time". However, all emails, and many other forms of electronic communications, contain metadata which record copious amounts of information, including the date and time of receipt. This information cannot appear within the sent email, but does appear within the received email. The metadata can be easily accessed. It is known by many email users, but apparently not the lawyers nor the judge in this case. Simple Discovery of the electronic version of the received email is all that is needed to access the recipient's email, and prove the time of receipt.

(2) The same issue arose in *Queensland Building Services Authority v J M Kelly (Project Builders) Pty Ltd* [2013] QCA 320. The Queensland Court of Appeal reversed the onus of proof needed in proving the receipt of the email. In doing so this case effectively rectified the unsatisfactory position of earlier cases, and would resolve the issue in the *Demex* case if it was argued and applied. In that case the evidence again did not satisfactorily establish if and when the email was received, although the general manager of the recipient indicated in evidence that it was received, but was not sure of the time. The Court of Appeal had the view that the recipient could have presented further evidence about the time of receipt, from the administrator, but did not do so, stating: "The (recipient) did not adduce evidence explaining why the staff member did not give evidence, so that the (recipient's) failure to adduce evidence from the staff member at least made it less likely that the court would draw the inferences for which the (recipient) contended." In failing to adduce this evidence, the Court of Appeal found against the recipient and held it was received soon after it was sent. The Court of Appeal stated that an inference could not be drawn in circumstances where the recipient failed to adduce evidence establishing the facts. Inferences can only be drawn from facts. This effectively reverses the onus of proof.

Latest CLOUT News

The CLOUT Team is excited to announce the **first-ever publication of a case from Pakistan in the CLOUT database**. This decision by the Islamabad High Court pertains to the recognition and enforcement of an interim award under the New York Convention… (see CLOUT case n. 2138).

Save the date! **A CLOUT Network meeting is scheduled to take place online between 15-17 October 2024.** The exact date and further information will be communicated via e-mail in due course.

We are pleased to welcome in the CLOUT Network a **new National Institutional Partner, the Deutsche Institution für Schiedsgerichtsbarkeit (DIS)** (German Institution for Arbitrators) from Germany!

From August 2024, the UNCITRAL secretariat has launched **a new way of publishing CLOUT abstracts in an effort to enhance searchability and user accessibility of the CLOUT database**. The new method publishes individual CLOUT case abstracts rather than multiple case abstracts in a CLOUT issue.

The **50th anniversary of the Limitation Convention is still going on**! The UNCITRAL secretariat is preparing a Digest which is expected to feature more than 120 cases on that text. For further information please consult A/CN.9/1174/Add.3, para. 15.

Latest Transparency News

On the occasion of the 10th Anniversary of the UNCITRAL Transparency Standards, a **presentation on the UNCITRAL Transparency Standards** is tentatively scheduled to be released in 6 UN official languages in September 2024. Monitor our UNCITRAL social media for updates!

UNCITRAL Transparency @ 10

Latest Press Releases

27/05/2024 El Salvador ratifies the "Beijing Convention on the Judicial Sale of Ships" and becomes the first State party to the Convention

27/06/2024 UNCITRAL/ UNIDROIT Model Law on Warehouse Receipts adopted by the United Nations Commission on International Trade Law

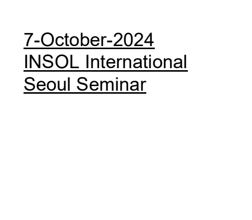
03/07/2024 The European Union signs the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration

15/07/2024 UNCITRAL Model Law on Automated Contracting finalized by the UN Commission on International Trade Law

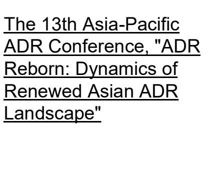
16/07/2024 UN Commission on International Trade Law concludes its 57th session in New York

18-20-Septmber-2024 Thailand ADR Week 2024: "Emerging trends in ADR: Charting the future of dispute resolution through international and regional developments"

26-September-2024 China Arbitration Summit 2024 & China-MENA Arbitration Summit



7-October-2024 INSOL International Seoul Seminar



The 13th Asia-Pacific ADR Conference, "ADR Reborn: Dynamics of Renewed Asian ADR Landscape"

2024 KMOJ-UNCITRAL ADR Special Session, "UNCITRAL and Regional Developments on Dispute Resolution"

29 October 2024 Interested CLOUT Network members should contact uncitral.rcap@un.org

Seventh Conference on International Coordination of Secured Transactions Reform: Bridging the Distance between Formulation and Implementation

30 October 2024 Register via **this link,** or via email to Sara Razavi (srazavi@ili.org), on or before 30 September 2024.

The CLOUT Team welcomes any CLOUT Network contributor who would like to make short contributions to the Newsletter with articles and information on the application of UNCITRAL texts in their own countries. Send your contributions at: monica.canafoglia@un.org and maria.giannakou@un.org

Universities, training centres, arbitration centres, law professors, judges and other interested law practitioners can contribute to the CLOUT collection even if they are not National Correspondents. They are strongly encouraged to contact UNCITRAL at monica.canafoglia@un.org and maria.giannakou@un.org for information.

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United Nations UNCITRAL

International Trade Law Division
(UNCITRAL Secretariat)
United Nations Office of Legal Affairs
Vienna International Centre
A-1400 Vienna, Austria

Tel.: (+43-1) 26060-4060
Fax: (+43-1) 26060-5813
e-mail: uncitral@un.org

Website: uncitral.un.org